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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 588

C. E. RUSS,
Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on July 16, 1964.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Tennessee is copied at pages 43a-56a of the certified record accompanying this petition.[1] The District

[1] The Appendices to the Briefs in the court below of the Petitioner and Respondent herein have been certified as the Record for use with this petition, nine extra copies of which are filed herewith. Vols. I and II comprise the Respondent's Appendix in the court below, and the pages are numbered from 1a-443a. The Appendix to Petitioner's Brief below has been attached at the beginning of Vol. III as pages 1b-3b. In this petition references are to the original pagination. Vol. III also includes the proceedings in the United States Court of Appeals for the Sixth Circuit.

Court's opinion and judgment are reported in 218 F. Supp. 634 (1963). The opinion of the Court of Appeals for the Sixth Circuit is set forth in the Appendix, *infra*, pages 36-44, and is not yet officially reported.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on July 16, 1964. No petition for rehearing was filed on behalf of petitioner. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. May the National Railroad Adjustment Board upon determining that a discharge by the carrier of an employee for violation of its operating and safety rules was excessive punishment, and therefore not justified, prescribe an award and order mitigating said punishment, which award and order is enforceable under 45 U. S. C. § 153 First (p), when the employee is covered by a collective bargaining agreement for the craft of which he is a member, and said bargaining agreement provides procedures for the handling of claims and grievances, including discharge for cause, and further provides for the processing and adjustment of all claims and grievances in proceedings instituted by the employee or his authorized representative before the National Railroad Adjustment Board?

2. May the Federal Courts set aside an award of the National Railroad Adjustment Board which orders the reinstatement of an employee discharged by a rail carrier unless the Board finds the discharge was wrongful, although 45 U. S. C. § 153 First (m) provides that awards of the Board shall be final and binding except insofar as they contain a money award?

STATUTES INVOLVED.

The statutes involved are the provisions of Section 3, First (m) and (p) of the Railway Labor Act, 45 U. S. C. 153 First (m) and (p), which are printed in the Appendix at pages 34-35, *infra*.

STATEMENT OF THE CASE.

This is an action brought in the United States District Court for the Eastern District of Tennessee under Section 3, First (p) of the Railway Labor Act, 45 U. S. C. 153, First (p), seeking enforcement of an award and order of the National Railroad Adjustment Board, issued on January 31, 1961. In its order, the Adjustment Board, First Division, directed the respondent carrier to comply with the terms of the award on or before March 2, 1961, by reinstating petitioner to employment and by paying him back pay for a period as of September 27, 1958, which was four months after his discharge, to the date of his reinstatement. Respondent, however, did not comply with the reinstatement portion of the award and order until May 29, 1961, when petitioner was restored to service without pay for time lost. Respondent refused to comply with the back pay provisions of the order, and the Brotherhood of Locomotive Engineers, as petitioner's bargaining representative, and petitioner filed proceedings in the District Court to enforce the monetary portion of the Board's order. By order of court, the Brotherhood was dismissed from the case which proceeded with petitioner Russ as party plaintiff (1a, 2a).

Petitioner Russ, a locomotive engineer, had been discharged by respondent on May 15, 1958 for alleged violation of certain Operating Rules, as interpreted by the respondent. On May 8, 1958, petitioner was the locomotive engineer on Extra 2152 West, operating from Louisville,

Kentucky to Princeton, Indiana (69a-70a, 324a). The locomotive fireman on the crew was J. D. Cox (80a, 133a-134a, 343a-344a). As they approached a point approximately one-half mile from Ramsey, Indiana, the train first met a motor car operated by Assistant Supervisor Tames and his crew (70a-71a). Petitioner was flagged by Tames, who was protecting his track car in accordance with Rule 9 of the carrier's Operating Rules for motor cars (35a). To enable Tames to proceed, petitioner backed his train into a side track. Tames, who was standing on the ground beside the switch, hollered to petitioner and passed on to him information that there was another track car heading toward Milltown, a point about six miles away (74a-75a, 124a, 329a). Petitioner relayed this information to fireman Cox (74a, 81a, 9?a, 117a-118a, 329a, 347a). Tames stated in the carrier's investigation of the accident that he was merely relaying information to petitioner (380a-381a). In the submission to the National Railroad Adjustment Board and before the District Court, petitioner alleged that Tames' actions did not constitute flagging for the second motor car as that procedure is related in Rule 9 of the Operating Rules for motor cars.

Petitioner did not proceed toward Milltown for approximately 20-22 minutes after he first met Tames' motor car (81a). After entering the main track, the train proceeded through a tunnel, then downgrade and around a curve where vision was obstructed (89a, 91a-92a, 119a, 294a, 327a, 345a-346a). While rounding the curve, petitioner could not see ahead of his locomotive cab, and fireman Cox's vision was limited to one or two car lengths ahead (92a, 114a, 119a, 151a, 157a, 327a). On rounding the curve, fireman Cox saw the track car about a car length ahead and shouted to petitioner to apply the brakes in an emergency position (92a, 93a-94a, 151a, 156a, 327a, 346a).

Petitioner applied the emergency brakes but struck the track motor car, which resulted in the death of its operator (94a, 98a, 105a, 327a-328a).

At trial before the District Court, petitioner testified that he did not apply the emergency brakes on the locomotive but only to the cars in the train, because he was afraid of flattening the wheels on the locomotive, and of causing the locomotive from sliding and jackknifing off the tracks (95a-100a). There was a conflict in the testimony at trial as to the speed of the train at the time it came upon the second motor car which was not properly on the main line since the operator had not obtained a lineup of movements on the main track pursuant to Rule 8 of the rules for operation of track motor cars, and was not complying with Rule 9 which required him to throw fusees or to put a red flag out a reasonable distance to warn opposing movements of his presence (85a-88a, 90a, 301a-302a). The testimony of the members of the train crew was that their speed was approximately 15 miles per hour (92a, 142a, 148a, 317a, 324a, 329a, and 347a). Tests made by the respondent with a somewhat similar train on the day following the accident tended to show from braking distances that the train was traveling from 25 to 30 miles per hour at the point of impact (297a, 397a-398a). Respondent's road foreman stated in the investigation that the longer stopping distances of petitioner's train from the test train which established the rates of speed were probably due to the loss of air from previous service applications of the brakes prior to encounter with the second car (399a). However, petitioner's testimony was that it took twice the braking distance to stop by balancing the air on the locomotive's brakes (100a). Since the motor car had only been visible to the fireman from 40 to 80 feet, the train could not have been stopped at this distance whether it

had been operated at 15 miles per hour or 30 miles per hour.

On May 12, 1958, respondent held an investigation at which petitioner was charged with violation of several Operating Rules pertaining to locomotive engineers, which are set forth at pages 331a-334a of the certified Record. Fireman Cox was charged with violating several of the same Operating Rules and several other rules pertaining to locomotive firemen. These Rules are set forth at page 350a of the certified Record. Briefly, it should be noted that Rule 1004 states that the engineer is jointly responsible with the conductor for the same movement and protection of the train; and Rule 109 states that both the engineer and conductor must give consideration to conditions of the track and all other conditions, and to reduce speed on curves and points where required for safe movement. Rule 1051, which was applied to Cox, states that firemen "are jointly responsible with the engineer for proper performance of the engine and, where necessary, the protection of the front end of their train."

Respondent took the position that these Rules and the information conveyed by Assistant Supervisor Tames required petitioner and Cox to run their locomotive at reduced speed, which is defined in the carrier's Operating Rules as proceeding prepared to stop short of train or obstruction (29a, 427a). Since petitioner was unable to stop short of the motor car, he was considered to have violated all of the above Operating Rules.

Thus, on May 15, 1958, respondent dismissed both petitioner and fireman Cox from service (283a-284a). On September 27, 1958, Cox was restored to service on a leniency basis without pay for time lost (424a).

The Brotherhood of Locomotive Engineers presented a grievance or claim in behalf of petitioner Russ and Cox

and engaged in appropriate conferences with officials of respondent up to the highest officer designated to handle such claims (197a-198a). Carrier's investigation and the conferences with the Brotherhood were held pursuant to Articles 31 and 32 of the collective bargaining agreement between the Brotherhood and the carrier (1b-3b). These Articles detail the procedure for disciplining an engineer and for processing his grievance. The conferences were not satisfactorily concluded (197a).

Therefore, pursuant to Article 32(b)(3) of the collective bargaining agreement and Section 3, First (i) of the Railway Labor Act, 45 U. S. C. 153, First (i), the Brotherhood, in February 1959, submitted this dispute to the National Railroad Adjustment Board, First Division, which is the proper division to decide grievances or disputes involving engineers and firemen, and requested restoration to service and pay for time lost for both petitioner and Cox. Article 32(b)(3) of the bargaining agreement states, in pertinent part:

> "All claims or grievances involved in a decision of the highest officer shall be barred unless within six months from the date of said officer's decision proceedings are instituted by the employees or a duly authorized representative before a tribunal having jurisdiction pursuant to law or agreement of the claim or grievance involved." (2b-3b.)

In the proceedings before the Board, the Brotherhood contended that neither petitioner nor Cox had violated the Operating Rules for which they had been discharged. It was stated that since they had not been properly flagged, they were not required to operate at reduced speed, and that the accident which occurred did not establish a violation of the Rules. It was contended that the accident was proximately caused by the failure of the track motor car

operator to protect his movement as he was required to do under Rules 8 and 9 of the carrier's Operating Rules for motor cars (283a-290a). It was said that petitioner had a right to expect a fusee or a warning from the track car operator to provide him with a reasonable distance in which to stop his locomotive.

On January 31, 1961, the Adjustment Board, First Division, with Referee Arthur W. Sempliner, issued its Award 19846 denying the claim of Cox and sustaining petitioner's claim to the extent that he should be restored to service as of September 27, 1958 with back pay from that date and seniority unimpaired (280a-282a). The findings of the Board stated that the track motor car operator's failure to comply with various safety rules was the proximate cause of the accident, which finding it supported with the Interstate Commerce Commission's investigation report (281a).

The Board thus posed the following question:

> "The question exists, however, that while the proximate cause of the accident was the responsibility of others than the claimants, was there a violation of the carrier's rules by claimants, sufficient to warrant the punishment imposed?"

The Board then proceeded to find as follows:

> "A warning had been given that a track motor car was in the area ahead. The obligation then existed to operate the train at a reduced speed, prepared to stop within the assured clear distance ahead. The accident was, per se, evidence of the violation of the rule. However, the docket further discloses that on September 27, 1958, claimant J. D. Cox was restored to service on a leniency basis, without pay for time lost, as carrier was of the opinion the discipline thus far assessed was sufficient punishment for his offense.

> The organization makes no reply to this position. The issue is not one of the degree of claimants' responsibilities and we need not define the extent of each. The carrier having determined that the punishment for one was sufficient, there is a wide disparagement in the punishment of the other, which cannot be justified. The claim of C. E. Russ should be sustained to the extent that he should be restored to service as of September 27, 1958, with full compensation from that date, and seniority rights unimpaired. The claim of J. D. Cox should be denied in accord with these findings." (281a-282a.)

On the same date the Adjustment Board issued an order directing the respondent to reinstate petitioner and to pay him the money award on or before March 2, 1961 (443a). Petitioner was not restored to service until May 29, 1961, and was never paid any part of the money portion of the award. A complaint seeking enforcement was filed on October 31, 1961 (5a-12a, 17a).

Trial de novo was held in the District Court. The District Court found that the evidence sustained the Adjustment Board's finding that petitioner, having been warned that the track motor car was ahead, was obligated to operate the train at reduced speed, prepared to stop within the assured clear distance ahead, and that the accident was, per se, evidence of the violation of the rule (53a).

In a memorandum opinion the District Court stated that the carrier had the authority to make, interpret and require obedience to its Operating Rules. The District Court held, however, that under the bargaining agreement and the Railway Labor Act the Adjustment Board had jurisdiction to find that discipline is excessive in a particular case and had the power to modify the same (55a-56a). The District Court agreed that, with the evidence

before it, the Board could properly find that the penalty of termination was too severe. The Court said:

> "As various courts have pointed out, the Board has experience in dealing with railroad labor agreements, grievances arising under them, their interpretation, and its expertise in such matters is considered vital in reaching correct results. For these reasons, its findings and conclusions are entitled to respect. This does not mean that it can usurp the prerogative of management to discipline employees for violation of safety rules. It does mean that it may determine after a full hearing whether the discipline imposed by management is too severe and if it so determines, fashion a remedy within the framework of the bargaining agreement which is fair to both the carrier and the employee. We are of the opinion that the evidence supports the finding of the Board that the penalty of permanent termination of work for a man sixty-six years old in a field in which he had given thirty-six years of his life—six years more than half of his life—with an unblemished record to May 8, 1958, the day of the accident, was too severe.
>
> "We are further of the opinion that the order of the Board restoring Russ to duty with pay as of September 27, 1958 is within the framework of the bargaining agreement between the Brotherhood of Locomotive Engineers and the Southern Railway Company and is valid and enforceable." (55a-56a.)

The District Court entered judgment against respondent carrier in the sum of $22,903.05, which was the full amount of the award (57a). Respondent appealed to the United States Court of Appeals for the Sixth Circuit. The carrier took the position that as both the Board and the District Court found the petitioner had violated one of its Operating Rules, respondent had the right to discharge him. It contended that its action was a valid exercise of managerial prerogative which could not be overturned by

the Board in the absence of a showing of discrimination or arbitrariness on its part.

Although petitioner contended before the Board and the District Court that he did not violate any rule of the Railroad, this point was not raised on appeal. Petitioner contended that both the Board and the District Court found the discipline imposed upon him by the carrier to be too severe, and that the Board therefore had the right to fashion a remedy which in its view was justified. He further stated that since Article 32(b)(3) of the bargaining agreement recognized the arbitration proceedings before the Board, the Board as arbitrator had the right to modify discipline, and that such authority was within its power to determine whether the claimant had been discharged for "just cause" under the collective bargaining agreement. Petitioner also claimed that if it was necessary for the Board to determine that the discipline administered was discriminatory on the part of the respondent, the Board, in taking into account the discipline given to the fireman, and the District Court, in pointing to his long record of service without accident, did determine that the excessive punishment was discriminatory.

The Court of Appeals found that nothing in the agreement or the Railway Labor Act limited the right of respondent to discharge for cause. Thus, the Board was not justified in ordering reinstatement without finding that the discharge was wrongful. Since Russ had violated the rule, the discharge could not have been found to be wrongful. He could not recover damages because the suit had to proceed in the District Court on principles pertaining to the law of master and servant. Although the Court pointed out that the proceedings before the Board amount to compulsory arbitration, it determined that the considerations applicable to voluntary arbitration wherein

the arbitrator can fashion a binding remedy were not applicable. The Court therefore passed the issue in regard to severity of discipline, because it found that the Board based its decision on discrimination, and because Russ had been reinstated. Thus, the Court below accepted the argument that the Board had no authority to modify the discipline without a finding that the carrier had acted in a discriminatory or arbitrary manner. The Court went on to find, however, that the issue of discrimination had no merit because the duties, responsibilities and conduct of the engineer and fireman were not identical and did not require the same discipline. The award was therefore determined to be arbitrary and erroneous.

The court below reversed the judgment of the District Court and remanded the cause with instructions to set aside the Adjustment Board's award.

REASONS FOR GRANTING THE WRIT.

The Judgment Below Has Decided a Federal Question in a Manner in Conflict With Applicable Decisions of This Court.

The Adjustment Board, under the Railway Labor Act, is considered an arbitrator created by Section 3, First (i) to settle or adjust disputes growing out of grievances. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30, 39 (1957). The Act has created a comprehensive and wholly exclusive system of compulsory arbitration under the auspices of the Adjustment Board. *Brotherhood of Locomotive Engineers v. Louisville & Nashville R. R. Co.*, 373 U. S. 33, 10 L. Ed. 2d 172 (1963), affirming 297 F. 2d 608 (6th Cir. 1961).

As an arbitrator in the railway labor field, the Adjustment Board has been accorded a specific expertise in this field. In *Washington Terminal Co. v. Boswell*, 124 F. 2d 235, 241 (D. C. Cir. 1941), the court stated in regard to the discretionary powers of the Adjustment Board:

> "* * * Though they (the findings) may not make his case finally, they do so initially. They also bring to the court the weight of decision on facts and law by men experienced in contracts, disputes and proceedings of this special and complicated character. The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or

> not, their judgment should carry weight when the judicial state of controversy is reached. It cannot be assumed, therefore, that the findings have no substantive effect, merely because they were not given finality, as to either facts or law. They are probative, not merely presumptive in value, having effect fairly comparable to that of expert testimony."

In the exercise or development of the Board's expertise, noted by the court in the *Washington Terminal* case, one of the foremost authorities concerning the Board has shown that the various divisions of the Adjustment Board "are busy building up their own common law and it is curious to note how seriously their lay members treat the precedence and with what skill they are able to urge that this case should be distinguished or that analogy applied." Garrison, *The National Railroad Adjustment Board; a Unique Administrative Agency,* 46 Yale L. J. 567, 583 (1937).

In its expertise, the Board, unlike the court below, did not believe that the degree of responsibility was the important factor in determining whether the punishment imposed on Russ was excessive. Rather, the Board, without specifically saying that the action of the carrier was "arbitrary," found in its expertise as follows:

> "The issue is not one of the degree of claimants' responsibilities and we need not define the extent of each. The carrier having determined that the punishment for one was sufficient, there is a wide disparagement in the punishment of the other *which cannot be justified.*" (Emphasis supplied.) (12a.)

The standard, applied in the instant award, of establishing arbitrariness of discipline and severity of punishment by comparing the discipline meted out to the claimant with others in the same crew or with individuals involved in comparable disciplinary cases is well settled

and in accord with the Board's principles as set forth in the following awards:

In *Brotherhood of Railroad Trainmen and The Chicago, Rock Island and Pacific Railway Company*, Award No. 7595 (First Division, 1943), the Board said:

> "The record discloses enough in the way of extenuating circumstances, even granting technical violations of the rules by both claimants, to persuade that the discipline was too severe in the cases of both Conductor Crotty and Brakeman Wedgeworth. *We find support in the record for this appraisal of the discipline in the fact that Engineer Capehart, who was also involved and, likewise discharged, was reinstated without pay for lost time some fourteen weeks thereafter.*
>
> "AWARD
>
> "Claimants are to be reinstated with pay for time lost, but provided that pay for such lost time is to commence to accrue from January 25, 1942, or the date of the reinstatement of Engineer Capehart." (Emphasis supplied.)

The Findings in *Brotherhood of Locomotive Firemen and Enginemen and Missouri-Kansas-Texas Railroad Company*, Award No. 14261 (First Division, 1951) concluded:

> "This Division has held in many past awards that it has jurisdiction to modify a disciplinary action of an employer, when the circumstances warrant.
>
> "It is further found from an examination of the full record that *while the action of the Respondent was neither arbitrary or capracious* (sic), *the punishment invoked was excessive and should be modified to the extent of reinstating the claimant*, with seniority rights unimpaired, and with pay for all time lost retroactive *to the date the conductor member of this*

crew was returned to service by the carrier." (Emphasis supplied.)

The doctrine was also adopted in *Brotherhood of Locomotive Firemen and Enginemen and Southern Pacific Lines, Atlantic System,* Award No. 15315 (First Division, 1952):

"* * * A careful consideration of the facts in this case and of the record as a whole, including the claimant's service and discipline record covering a period of about forty-five years, compels us to conclude that although a severe disciplinary penalty was justified, the extreme penalty of dismissal was *unduly drastic* and must be modified so as to be made commensurate with the offense and reasonably *consistent with the carrier's treatment of other employes charged with similar violations.*" (Emphasis supplied.)

The conclusion must therefore be reached that the Adjustment Board award involved herein is appropriate on the basis of the Board's principle concerning excessive punishment as premised in the decisions set forth above. In further substantiation of the basic propositions supported here, petitioner points to the vast number of labor arbitration decisions in industries other than the railway field where the arbitrator found discipline to be too severe or excessive, and on that basis alone reversed management's decision. For example, see *Federal Services, Inc. and GUA, Local 33,* 64-1 ARB, paragraph 8136, where the arbitrator held the discharge of an employee for lying as too severe even though management claimed that the violation indicated a compromise of the high security essential for the work being performed, therefore necessitating the discharge. The employee was reinstated with compensation for the entire period.

Although the arbitration rendered by the Adjustment Board is a statutory creation, there has been a similar

tendency in other industries to include arbitration provisions in the collective bargaining agreement. These agreements have been held enforceable in the federal district courts under Section 301 of the Labor-Management Relations Act (29 USC 185). *Textile Workers v. Lincoln Mills,* 353 U. S. 448 (1957). As a result, many of the problems confronting this Court have been met previously. Some were resolved in the so-called *Steelworkers* Trilogy. *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U. S. 593 (1960); *United Steelworkers v. American Mfg. Co.,* 363 U. S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U. S. 574 (1960).

As a matter of fact, the *Enterprise Wheel* case dealt primarily with the question of remedies in arbitration, which is the gravamen of the instant controversy.

In the *Enterprise Wheel* case, the arbitrator found that the discharge of several employees for leaving work in protest to the previous discharge of a fellow employee was not justified, although he found their conduct to be improper. In his view, only a ten-day suspension should have been imposed. Thereupon, he fashioned a remedy in which he ordered the reinstatement of the employees with back pay, minus the period of a ten-day suspension. As here, the arbitrator substituted his judgment for that of management and modified the discipline originally meted out by the employer. He did not consider whether management's action was arbitrary. He did not say why a ten-day suspension was considered by him to be a more appropriate punishment. As here, the employer refused to abide by the award and order. In the *Enterprise Wheel* case, the bargaining representative sought enforcement of the award and order. On certiorari, this Court in holding the award and order enforceable, stated in part, at page 597:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency."

It may be seen that the courts are now recognizing what has long been claimed by arbitrators, that the arbitrator is permitted his informed judgment in fashioning flexible remedies and in modifying discipline. The power, however, has been implied rather than specifically predetermined by the parties. This fact has never deterred arbitrators generally, or the Adjustment Board, from awarding remedies for contract violations or in modifying disciplinary action of the employer. This was previously shown in this brief in regard to the Adjustment Board. In addition, arbitrators generally have uniformly held that the power to decide the contract violation must carry with it the power to fashion an award and remedy. *Oregonian Publishing Co.*, 33 Lab. Arb. 574 (1959); *Patterson-Sargent Co.*, 23 Lab. Arb. 21 (1954).

Finally, in 1961, the Fifth Circuit Court of Appeals, taking cognizance of the *Steelworkers* Trilogy, particularly the *Enterprise Wheel* case, affirmed the power long claimed by arbitrators. The court held that an arbitrator has the power to effectuate a remedy, even when the collective bargaining agreement specifically declared that the arbitration body "shall have no authority to violate, contravene, disregard or supplement the terms of this agreement." *Lodge 12, Machinists v. Cameron Iron Works, Inc.*, 292 F. 2d 112 (5th Cir.), cert. den. 368 U. S. 926 (1961).

The language which the court used in making this decision was so positive and broad that a district court in

that circuit was persuaded to reverse an earlier holding that the arbitrator had no authority to fashion a remedy or apply his own judgment. *Texas Gas Transmission Corp. v. International Chemical Workers,* 200 F. Supp. 521 (D. C. La. 1962). The Court said under the broad teaching of *Cameron,* that it is clear that, in order to deny the arbitrator power to fashion an appropriate remedy for breach of the collective agreement, there must be clearly restrictive language in the contract negating the arbitrator's power to fashion a remedy. It was held that under the great latitude given arbitrators in formulating remedies the arbitrator had the power to assess the "penalty" entered by him. When the above authorities are coupled together, it is obvious that the award and order reinstating and granting back pay to petitioner Russ is valid and enforceable, was granted in accordance with the authority of the Adjustment Board, is not contrary to the provisions of the collective bargaining agreement, but is specifically within the provisions of Articles 31 and 32 thereof, and did not violate any principles of law by changing discipline administered by the employer (1b-3b). The *Enterprise Wheel* case establishes beyond question the validity and enforceability of an award ordering the reinstatement of an employee whom the employer had discharged, even though the Adjustment Board may have found the conduct for which the employee was discharged to be improper or in violation of the employer's rules.

If the Adjustment Board is to function in accordance with this Court's pronouncements on the subject of arbitration, it must be treated akin to arbitrators who are within the purview of the *Enterprise Wheel* doctrine. In fact, in *Brotherhood of Locomotive Engineers v. Louisville & Nashville R. R. Co.,* 373 U. S. 33, 10 L. Ed. 2d 172, at 179, Justice Goldberg, in his dissenting opinion, stated in interpreting the majority opinion as follows:

> "Given the premises of Chicago River, it must follow that such enforcement proceedings are governed by federal law as declared by this court in cases such as *Steelworkers v. American Mfg. Co.*, 363 US 564, *Steelworkers v. Warrior & Gulf Co.*, 363 US 574, and *Steelworkers v. Enterprise Corp.*, 363 US 593, * * *."

Furthermore, Congress saw fit to commission the Adjustment Board to bring its expert judgment in the fair solution of any given labor situation in the railroad field. The very name "Adjustment Board" shows that Congress intended that this arbitration body have a variety of tools in meeting the many problems of labor relations in the railroad industry. The specific language employed in Section 3, First (i) of the Act, 45 USC 153, First (i) shows that there were to be "adjustments." The Board was not to be limited to a specific remedy to be awarded in particular contingencies. As the court said in *Capitol Airlines, Inc. v. Air Line Pilots Association, International*, 54 LRRM 2326 (D. C. Tenn. 1963), the Adjustment Board is not faced with an "either/or situation," but there is a middle ground in which it may operate. To enforce the award and order in this case properly follows the purpose of arbitration and of arbitration bodies, including the Adjustment Board. In other words, they are to balance the interests of management and labor providing peaceful solutions as to the day-to-day relationships between labor and management.

The court below recognized that the trilogy of the *Steelworkers* cases supports the position that where the parties have submitted to voluntary arbitration, the arbiter can fashion a remedy and issue an award which would be binding on both parties. The court, however, disregarded Article 32 of the applicable agreement which provides for submission of any grievance or dispute to the Adjustment Board by either of the parties. In addition,

the court failed to properly apply the doctrine set forth in the *Enterprise Wheel* case. This Court should decide the applicability of the *Steelworkers* cases upon the authority of the Adjustment Board and the effect thereupon on the enforceability of Adjustment Board awards.

The Court Below Has Rendered a Judgment Deciding an Important Question Under the Railway Labor Act, Affecting Labor Relations in the Railroad Industry and Delineating the Authority of the National Railroad Adjustment Board, Which Should Be Reviewed by This Court.

The court below has accepted the contention of the respondent that the carrier, under the facts presented, possesses the managerial prerogative or unilateral authority to make rules, to finally interpret them, to unilaterally determine a violation of these rules, and, upon finding a violation, to assess discharge or punishment therefor which cannot be modified by the National Railroad Adjustment Board in the absence of a finding that the discharge was wrongful or that the railroad in discharging the petitioner acted arbitrarily. The acceptance of this contention in the opinion below means that the Adjustment Board did not have the authority to modify the discipline of discharge which the carrier had imposed, even though the claim was before it under the "just cause" provisions of the applicable collective bargaining agreement which also provided for arbitration by the Board. It also means that the Adjustment Board may not issue an enforceable award and order which mitigates discipline upon finding it excessive, unless a specific provision in the collective bargaining agreement grants the Board such authority.

First, if the opinion and decision of the court below is permitted to stand, the Adjustment Board would not

have the authority at any time to modify the discipline of discharge imposed by a carrier when a claim has been submitted to the Board under the "just clause" provisions of the bargaining agreement. This conclusion, however, stems from an erroneous reliance on common law rules which are not applicable to the instant proceedings. The major authority supporting this finding in the opinion below is *Thomas v. New York, Chicago & St. Louis R. Co.*, 185 F. 2d 614 (6th Cir. 1950). In that case, the plaintiff was a non-union employee who did not have any contract with his employer creating continued employment. Under those circumstances, the employee was subject to termination of his emplyoment at the will of his employer. The Board erred in ordering his reinstatement and back pay, for he could not have been wrongfully discharged since there was no continuous right of employment arising out of the contract or any violation of the Railway Labor Act. In the instant case, petitioner was a union employee entitled to the benefits flowing from the collective bargaining agreement which contains clauses in regard to seniority, discipline and discharge, and also contains a detailed procedure for processing grievances and claims, including submission to the Adjustment Board. Thus, the incidents of continued employment arise from provisions of the collective bargaining agreement. The court in *Thomas* set forth this important distinction by stating, at page 617:

> "Appellant was not a union member and hence cannot rely upon any union contract as to duration or tenure of employment. If any individual contract between appellant and the carrier limited the prerogative of discharge and created a continued employment, nothing to that effect was introduced in evidence."

In this case, the limitation upon the carrier's managerial prerogative arising from Article 31 of the collective

bargaining agreement which limits its right to discharge or discipline for just cause only was disregarded. The decision below further failed to recognize that in Article 32 of the same collective bargaining agreement the carrier has agreed to a procedure of adjustment of grievances or claims culminating in proceedings instituted by the employee or his duly authorized representative before the National Railroad Adjustment Board.

To further understand the limitations over managerial prerogative in the discipline area, consideration must also be given to Section 3, First (i), 45 USC 153, First (i). This section provides that disputes growing out of grievances are to be handled as follows:

> "* * * in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing on the disputes."

Disputes handled by the Adjustment Board growing out of grievances have been described as "cases of discipline or refusal to promote." Garrison, *The National Railroad Adjustment Board; a Unique Administrative Agency*, 46 Yale L. J. 567, 583 (1937). The author states at page 586 of his article that grievances consisting of questions of discipline or refusal to promote are reviewable by the Adjustment Board. The theory that a railroad in these circumstances may discharge any of its employees due to an alleged limitless managerial prerogative in regard to hiring and firing of employees has no basis. The applicable provisions of the collective bargaining agreement and of the Railway Labor Act show that the question of discipline

and the measure of that discipline were subject to review by the National Railroad Adjustment Board.

The argument that the carrier is the final authority as to the measure of discipline has frequently been presented to the Adjustment Board. In *Brotherhood of Railroad Trainmen and Southern Railway Company,* Award No. 20007 (First Division, 1961), a claim was filed in behalf of Conductor A. E. Anderson for restoration to service with seniority unimpaired and pay for all time lost as a result of his dismissal from the service of the carrier due to his alleged responsibility for an accident at Roberta, Alabama, on September 29, 1958. The carrier's position was stated in the findings as follows:

> "The respondent further argues that when there is evidence of rule violation it has a right to administer the measure of discipline and this Division may not substitute its judgment for that of management. * * *"

In response to this argument the Division replied in its award:

> "* * * There is no need to elaborate on this subject because in many instances when requested to review claims presented to this Division for modification of carrier's penalty, *when the Division felt that it was excessive, the Division has sustained these claims either in whole or in part. Therefore, we must determine whether* there was sufficient evidence presented and sustained at the investigation that proved Conductor Anderson was guilty as charged by the respondent, and if so, would *these violations warrant the penalty imposed* by the carrier * * *." (Emphasis supplied.)

Upon its evalution of the alleged offense and the gravity thereof, the Board found that the defendant carrier

had acted arbitrarily by rendering excessive discipline. The First Division stated:

> "After carefully considering all of the evidence presented to us we find that the decision of the respondent was in error and was both arbitrary and excessive. If carrier had felt that claimant's judgment was wrong and he deserved some form of discipline, it might have done so in line with the system in use on the property, but even then consideration should have been given to claimant's thirty-two years of loyal service (claimant's record was not introduced so we must assume that it was good).
>
> "Since the record conclusively establishes claimant was unjustly dismissed (even though lesser discipline might have been warranted) and the carrier operates under a system of discipline which specifically precludes suspension with loss of pay, this Division would not be justified in penalizing claimant in that manner. Since the record conclusively establishes that claimant was unjustly dismissed we find that he should be restored to service with seniority unimpaired and paid for all time lost."

In additional cases, the Board has had within its expertise the question of management's prerogative in regard to the modification of discipline. The Board of its own volition found a discharge to be quite excessive and stated as follows in *Brotherhood of Locomotive Engineers and Cleveland, Cincinnati, Chicago and St. Louis Railway*, Award No. 4917 (First Division, 1940):

> "While there is no question but that the engineer here concerned was at fault for the collision involved we think the discipline administered quite excessive, considering the fact that the man had 47 years seniority, and should the discipline of discharge be affirmed he would be deprived of the benefits accruing from a lifetime of service. It is argued here that this being an appeal for leniency, that that is a high

prerogative of management alone; we do not agree to that proposition. A more reasonable discipline would have been to restrict him to yard service or such other service as he might be suited for and it is the intent of this award that the carrier has that prerogative. We think the discipline has fully served its purpose and that he should be restored to his original seniority but without pay for time lost."

In 1947, the First Division of the Board was involved in debate among the regular members as to its power to interfere in cases of discipline. In *Brotherhood of Locomotive Engineers and Union Pacific Railroad Company*, Award No. 11854 (First Division, 1947), the referee, in the Board's findings, stated the aforementioned question and its resolution as follows:

"This brings us to the question, which has been hotly debated, as to the power of this Division to interfere in cases of discipline. We do not think that there is any real disagreement in the awards on this point. *The rule is that the imposition of discipline is the province of the Carrier with the right in this Division to interfere if the Carrier's decision is manifestly unjust.*

"It is now apparently suggested for the first time that, though the Division may in accordance with the above principle set aside a finding of guilt as to a violation of the rule, it may not mitigate in any degree the punishment imposed. We see no reason for such a distinction. An unjust or arbitrary sentence constitutes a grievance which it is as much within the jurisdiction of this Division to right as is an unwarranted finding of an employe's guilt; and the consequences to the employe may be as serious in one case as in the other.

"In innumerable awards, some by unanimous decision without the aid of a referee, and many with referees participating, the principle has been upheld

> *that this Division has the power to modify a sentence if it is unreasonable or manifestly unjust.* We cite just a few out of a large number. Awards 24, 1757, 3512, 2026, 2630, 2633, 3316, 8862, 11203. This question should by now be regarded as settled." (Emphasis supplied.)

The decision below therefore missed the mark when it determined that the basic issue in deciding whether the Board's award and order was enforceable was whether the carrier acted arbitrarily or in bad faith in its interpretation and application of its rules and in imposing the discipline. The question is whether the Adjustment Board, as the final arbitrator of discipline cases, has authority to modify discipline upon finding that punishment was excessive, even though it found that the employee had committed an offense.

In *Capitol Airlines, Inc. v. Air Line Pilots Association*, 54 LRRM 2326 (D. C. Tenn. 1963), which involved a discharge for smuggling, the court stated:

> "The question presented is whether or not in ordering reinstatement the Board having found the employees guilty of the charges, exceeded its authority under the collective bargaining agreement and under the agreement establishing it and defining its powers and procedures."

The basis of the Board's award in that case was that dismissal was too severe a punishment. The company, however, argued, in effect, that since nothing specific in the contract limited management's right to discharge for violation of its rules, the punishment could not be modified by the System Board of Adjustment where it found the employees guilty of the charges. The court stated, however:

> "Although the agreement in the present case is not so explicit as to set out that no discharge should

be without just cause, the language in the agreement is sufficiently broad to include the lack of just cause as a proper grievance. A decision of the company to discharge an employee for misconduct, even if the employee is guilty, may or may not be for just cause. If the offense and the circumstances accompanying it are sufficient to warrant such a penalty, just cause would exist, but it is also true that in many cases such a penalty may be excessive and unwarranted. The penalty actually imposed by the company is an 'action of the company affecting' the employee and consequently constitutes the subject of a grievance as defined in Section 27 of the agreement.

Therefore, it cannot be said that the Board exceeded its authority in mitigating the punishment and ordering reinstatement without exonerating the employees." (54 LRRM 2329.)

Since this System Board did not exceed its authority in mitigating punishment where it found the employee had violated the air lines' rules, it can be seen that the court found that management was not the final authority as to the measure of discipline under the provisions of the bargaining agreement. Airline System Boards of Adjustment are provided for in the Railway Labor Act, 45 U. S. C. 181. Although both air and rail system boards are created by mutual agreement of the parties, they have the same duties and functions as the National Railroad Adjustment Board and are governed by the provisions of Section 3 of the Act, 45 U. S. C. 153.

The above authorities establish that the carrier in the instant case did not have the absolute and final determination as to the discipline to be imposed. Under the "just cause" provisions of the collective bargaining agreement, the Adjustment Board could modify the discipline if it found it excessive or unjust, even though it found that the employee had committed the offense for which he had been

discharged. The Board found that discharge was unwarranted and excessive punishment in view of the nature of the offense and the suspension given the fireman (281a-282a). The District Court found that discharge was an excessive penalty or too severe in that the petitioner had worked for the carrier for a period of thirty-six years with an unblemished record. (55a-56a.) Both findings were based on the record and were reasonable. Adopting the petitioner's contention that the Board had authority to formulate a remedy, the facts are adequate to support the award of the Board and the decision of the District Court. In that the Board in its expertise found that the discharge was excessive and the decision of the District Court affirmed that finding, there is no basis for the conclusion of the Court of Appeals that the award was arbitrary and unenforceable (Appendix, p. 44).

The judgment below now establishes, however, that the many decisions of the Board as to its powers and its authority to mitigate punishment when ruling on a claim under its expert interpretation of the "just cause" provisions of the collective bargaining agreement are not correct. If this decision is permitted to stand, railway labor, railway management, and the Adjustment Board will not know the proper role of the Board in disciplinary actions.

Second, the decision below holds that an award and order of the Adjustment Board mitigating discipline upon finding it excessive is not enforceable under the provisions of Section 3, First (p) of the Railway Labor Act, unless a specific provision in the collective bargaining agreement limits the authority of the railroad to discharge an employee for cause by granting the Board authority to modify punishment. The court stated:

> "We find nothing in the agreement or in the Act which limited the right of the railroad to discharge an

employee for cause. In the absence of a statute or an agreement, an employer may discharge his employee for cause or without cause. Violation of a rule certainly justified a discharge even for cause." (Appendix, pp. 41-42.)

Not only does the decision restrict the Board from determining in the first instance its authority, but it further limits its expertise in interpreting contractual provisions, which language it may interpret to be sufficiently broad to include the authority to determine whether punishment is excessive or unwarranted.

Under this view, a specific provision giving the Adjustment Board the power it has claimed for years to modify discipline upon finding it excessive would be required to be included in the bargaining agreement. Under this view, the Adjustment Board would have authority only to rule on those claims where an express provision of the contract applies. Thus, under this view labor and management upon drafting the agreement would be required to ascertain every problem which could arise in the future, and would be required to include provisions to cover any anticipated situation. To require the parties to cover every possible contingency in a collective bargaining agreement is out of line with the purposes and practicalities of the collective bargaining process. This is particularly true in an industry where contracts are not negotiated every two or three years, and the basic agreements were drafted and have been in effect for decades. This is true in an industry where labor contracts contain skeletal clauses and only provide the minimum number of provisions in regard to the orderly regulation of labor-management relations.

If this decision is permitted to stand, labor representatives must either risk standing on the basic contracts,

knowing that any interpretation by the Adjustment Board of the provisions to include the usages of the industry or any implied powers claimed by the Adjustment Board before which labor is compelled to arbitrate under the doctrine of *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957) and *Brotherhood of Locomotive Engineers vs. Louisville & Nashville R. R. Co.*, 373 U. S. 33 (1963), will be negated in enforcement proceedings, or must serve Section 6 notices under 45 USC § 156 on all carriers to place into effect comprehensive and encyclopedic contracts in order to cover every grievance, dispute or controversy which could arise in the future. Thus, the decision below could cause havoc and instability to the already tenuous area of labor relations in this industry. This Court should, therefore, determine the authority of the Adjustment Board and decide the relationship of the Adjustment Board in interpreting the collective bargaining agreement.

The Judgment Rendered in the Court Below Has Failed to Properly Apply Section 3, First (m) of the Railway Labor Act.

In the instant case, the Adjustment Board ordered the carrier to reinstate petitioner to his former position by March 2, 1961. Respondent, however, refused to return petitioner to service until May 29, 1961. During this period, the Board's order for back pay was still in effect. The Court of Appeals for the Sixth Circuit determined that since the discharge was not wrongful in the first instance, petitioner could not recover any pay for time lost. Under Section 3, First (m) of the Railway Labor Act, 45 USC 153, First (m), however, the Court did not have jurisdiction to set aside the Board's award of petitioner's reinstatement to be made effective on March 2, 1961, for

this section provides that "the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award."

By setting aside the Board's order, the court denied petitioner the right to reinstatement by March 2, 1961, and, in effect, erroneously determined that the reinstatement portion of a Board award and order is not final and binding. The court below, though setting aside the monetary portion, should have required respondent to pay petitioner the amount owing from March 2, 1961 to May 29, 1961. If a Board order as to reinstatement is not effectuated in this manner, carriers who are ordered to restore employees to service will not do so. In view of this decision, carriers may refuse to reinstate an employee in conformance with the Board order for one or more years while enforcement proceedings are pending. If the decision of the court is adverse to the claimant as to the monetary portion of the award, he would lose back pay not only from the time he should have been reinstated but to the time that he is actually reinstated by his employer.

The decision below weakens the Adjustment Board's position as compulsory arbitrator of the grievances and disputes presented, and negates its statutory power to render an order of reinstatement which is final and binding.

This question which was raised by the judgment in setting aside the entire award and order should be reviewed, in that the decision appears to modify the unequivocal language of the statute.[1]

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[1] It should also be noted that because the entire award was set aside the order below taxes the costs of appeal to petitioner, the plaintiff-appellee below. (Appendix, p. 35.) The order is clearly in error in this respect. because Section 3, First (p) states: "that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal."

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

TITLE 45 U. S. C. § 153, First (m) and (p).

Sec. First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the pro-

ceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed July 16, 1964.)

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded, with instructions to set aside the award of the National Railroad Adjustment Board.

It is further ordered that defendant-appellant recover from plaintiff-appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Approved for entry:

s/ PAUL C. WEICK,
Chief Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Before Weick, Chief Judge, Miller and Phillips, Circuit Judges.

Weick, Chief Judge. This appeal is from an order of the District Court enforcing the monetary portion of an award and order of the National Railroad Adjustment Board which directed Southern Railway Company to reinstate, with back pay, C. E. Russ, a locomotive engineer who had been discharged by the railroad for violation of its safety and operating rules.

The facts are fully stated in the opinion of the District Judge, reported in 218 F. Supp. 634, and need be referred to only briefly, here.

The controversy arose out of a collision in which a train operated by Engineer Russ, collided with one of Southern's track motor cars, killing the operator of the car. After an investigation, the railroad discharged Engineer Russ and Fireman J. D. Cox, on May 15, 1958, for violation of its safety and operating rules.

A warning had been given by the Assistant Supervisor to Russ, prior to the collision, that the track motor car was in the area ahead. Russ communicated this warning to Cox. In such a situation, the rules of the railroad required that the train be operated at a reduced speed sufficient to bring it to a stop within the assured clear distance ahead. The rules also required the fireman to maintain a lookout for obstructions on the tracks and to warn the engineer thereof.

The railroad reinstated the fireman on September 27, 1958, on a leniency basis, without pay for time lost, but did not reinstate Engineer Russ.

In February, 1959, the Brotherhood of Locomotive Engineers made claim to the National Railroad Adjust-

ment Board in behalf of Russ and Cox, for restoration of service and back pay. The Board on January 31, 1961 made findings to the effect that the accident was per se a violation of the rule requiring the engineer to operate the train at a reduced speed so that he could stop within the assured clear distance ahead. It found, however, that there was "a wide disparagement [1] in the punishment" which the railroad administered to the engineer and fireman which could not be justified. It was of the view that there was no issue involved over the degree of responsibility involved in the two positions. It denied the claim of Cox for back pay, but ordered Russ reinstated as of the same date when Cox was reinstated, namely, September 27, 1958, and with back pay from that date amounting to $22,903.05, and seniority unimpaired.[2]

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[1] We believe that the word 'disparity' was intended.

[2] The Board said:

"The question exists, however, that while the proximate cause of the accident was the responsibility of others than the claimants, was there a violation of the carrier's rules by claimants, sufficient to warrant the punishment imposed? A warning had been given that a track motor car was in the area ahead. The obligation then existed to operate the train at a reduced speed prepared to stop within the assured clear distance ahead. The accident was, per se, evidence of the violation of the rule. However, the docket further discloses that on September 27, 1958, claimant J. D. Cox was restored to service on a leniency basis, without pay for time lost, as carrier was of the opinion the discipline thus far assessed was sufficient punishment for his offense. The organization makes no reply to this position. The issue is not one of the degree of claimants' responsibilities and we need not define the extent of each. The carrier having determined that the punishment for one was sufficient, there is a wide disparagement in the punishment of the other, which cannot be justified. The claim of C. E. Russ should be sustained to the extent that he should be restored to service as of September 27, 1958, with full compensation from that date, and seniority rights unimpaired. The claim of J. D. Cox should be denied in accord with these findings."

The railroad restored Russ to service on May 29, 1961, without pay for lost time, and ordered him to report for duty on July 20, 1961. It refused to comply with the back pay provisions of the order, with the result that the Brotherhood and Russ filed proceedings in the District Court to enforce the monetary portion of the Board's order. The Board was dismissed from the case, which proceeded with Russ as party plaintiff.

The case was tried de novo in the District Court on the record before the Board and on new evidence offered in Court. In a memorandum opinion, the Court held that the evidence sustained the finding of the Board that Engineer Russ had violated the railroad's rule. The Court was of the view, however, that while the Board could not usurp the prerogative of management to discipline employees for violation of safety rules, it had the right to determine whether the discipline was too severe, and to fashion a remedy within the framework of the bargaining agreement between the railroad and the Brotherhood of Locomotive Engineers. The Court was of the opinion that the evidence supported the finding of the Board that the penalty of permanent termination of work was too severe and that the order of the Board restoring Russ to duty with back pay was within the framework of the bargaining agreement and was valid and enforceable. He entered judgment against the railroad in the sum of $22,903.05, which was for the full amount of the award, reserving the application of plaintiff for allowance of attorneys' fees pending review by this Court.

At the outset the question is presented as to the force and effect of the monetary award made by the Board and the scope of review by the District Court and this Court.

The Railway Labor Act provided that the awards of the Board "shall be final and binding upon both parties to

the dispute, except insofar as they shall contain a money award." 45 U. S. C. § 153 First "m."

With respect to suits for enforcement, the Act provided that they "shall proceed in all respects as other civil cases, except that on the trial of such suit the finding and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated * * *" and the District Courts are empowered to enter such judgment "as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." 45 U. S. C. § 153 First (p.).

The Board had exclusive primary jurisdiction over disputes arising out of collective bargaining agreements. *Pennsylvania R. Co. v. Day*, 360 U. S. 548; *Hodges v. Atlantic Coast Line R. Co.*, 310 F. 2d 438 (C. A. 5).

An award which does not contain an order for the payment of money is final and binding on both parties to a dispute. *Brotherhood of Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U. S. 33, 40; *Trainmen v. Chicago R. & I. R. Co.*, 353 U. S. 30.

It is clear, however, from the express language of the statute, that money awards of the Board are not final and binding, but the railroad may appeal therefrom to the District Court and obtain a de novo hearing. *Washington Terminal Co. v. Boswell*, 124 F. 2d 235 (C. A., D. C.), affirmed by a divided Court in 319 U. S. 732; *Thomas v. New York, Chicago & St. Louis R. Co.*, 185 F. 2d 614 (C. A. 6); *Callan v. Great Northern Ry. Co.*, 299 F. 2d 908 (C. A. 9); *Brotherhood of Railway, etc. v. Atlantic Coast Line R. Co.*, 253 F. 2d 753 (C. A. 4); *Boos v. Railway Express Agency, Inc.*, 253 F. 2d 896. The Court may take evidence and is not bound by the findings of fact of the Board, which are only prima facie evidence. The award,

however, carried with it a presumption of validity. *Trainmen v. Chicago R. & I. R. Co., supra.* The weight to be given to it is comparable to that accorded to expert testimony. *Washington Terminal Co. v. Boswell, supra; Thomas v. New York, Chicago & St. Louis R. Co., supra.* The Court is empowered to enforce or set aside the Board's order. *Brotherhood of Locomotive Engineers v. Louisville & Nashville R. Co., supra,* pp. 41 and 43; *Brotherhood etc. v. Railway Express Agency,* 238 F. 2d 181 (C. A. 6).

The burden of proof was on the railroad to prove that the award was wrong. *Elgin, Joliet & Eastern Ry. Co. v. Burley,* 327 U. S. 661; *Brotherhood etc. v. Railway Express Agency, supra.*

Since these suits in the District Court are to proceed as other civil suits and the trial is anew, the Court was free to adopt findings of fact and conclusions of law. The scope of appellate review would seem to be the same as in other civil cases. The reviewing court is bound by the clearly erroneous rule. Rule 52(a) Federal Rules of Civil Procedure.

The railroad points out that both the Board and the Court found as a fact that Engineer Russ had violated one of its rules. It contends that it had the right to discharge Russ for such violation, and its action in so doing was in the exercise of the prerogative of management, which could not be usurped by the Board in the absence of a showing of discrimination or arbitrariness on its part.

Russ and Cox both contended before the Board that they did not violate any rule of the railroad. This point is not in issue in this appeal. Russ contends here that the discipline imposed on him by the railroad was too severe, taking into account his long record of service and when compared with that administered to the fireman, was

discriminatory. He claims the Board had the right to fashion a remedy and likens the case to a voluntary arbitration proceeding. He cites the trilogy of Steelworkers cases as authority. *United Steel Workers v. American Mfg. Co.*, 363 U. S. 564; *United Steel Workers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574; *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593.

The collective bargaining agreement contained no provision for arbitration. It did provide procedure for investigations and discipline as follows:

> Article 31. Investigations and Discipline.
>
> (1) Engineers will not be discharged or demerited without the authority of the Superintendent, and after he has reviewed the evidence, he will give the engineer an opportunity of being heard in his defense. Investigation will be held by proper officer within five days if possible, and the accused engineer and his representative will have the privilege of hearing all evidence submitted and interrogating all witnesses. An engineer will have the privilege of having another employee in engine service with him at the investigation, to assist him, provided such assistant is in good standing on the division. If found blameless, he will be paid for time lost and placed back on his run. If discharged or demerited, he will be advised within thirty days of the cause, and, if requested in writing, written statement showing the cause will be furnished him within fifteen days from date of receipt of request."

The collective bargaining agreement contained provisions for the processing of grievances, which were followed in this case.

We find nothing in the agreement or in the Act which limited the right of the railroad to discharge an employee for cause. In the absence of a statute or an agreement, an

employer may discharge his employee for cause or without cause. Violation of a rule certainly justified a discharge even for cause. 56 C. J. Sec. 219.

The Board would not be justified in ordering reinstatement without a finding that the discharge was wrongful. *Thomas v. New York, Chicago & St. L. R. Co., supra; Tinnon v. Missouri Pacific R. Co.*, 282 F. 2d 773 (C. A. 8).

The Board made no such finding here. Its finding was only that there was a disparity in the punishment imposed for the engineer in relation to that administered for the fireman. It then proceeded to impose the same discipline on each without making any determination as to either the degree of responsibility or fault. It stated:

> The issue is not one of the degree of claimant's responsibilities and we need not define the extent of each.

The District Court entertained the same view and he made no findings with respect to this issue.

At the time the railroad discharged Russ and Cox for violation of its rules, it accorded to both the same treatment. There was no discrimination. The charge of discrimination arose only because four months later the railroad reinstated Cox, on considerations of leniency, but extended no leniency to Russ. About thirty-three months after dismissal, following the entry of the Board's order, the railroad voluntarily reinstated Russ, but without back pay. Cox lost four months' pay, and Russ thirty-three months' wages. This was the posture of the case when it was tried in the District Court.

We pass the issue of severity of the discipline discussed by the District Court, because the Board based its decision on discrimination, and Russ has been reinstated. The issue of discrimination might have merit if the duties,

responsibilities and conduct of the engineer and fireman were the same. Cf. *Brotherhood of Railway Trainmen v. Louisville & Nashville R. Co.*, 211 F. Supp. 308, 310 (N. D. Ala., S. D. 1962). But they were not identical and in our judgment did not require the same discipline.

The engineer had a much greater responsibility than the fireman. He was in control of the operation of the train. The throttle and brake levers were on his side of the cab. There was an emergency brake lever on the fireman's side, which he could use only in an emergency. Every crew member was required to take orders from the engineer. The fireman was required to assist the engineer and to take orders and instructions from him. There was a difference in the salary paid for the two positions. It was the engineer who, in violation of the rule, failed to bring the train to a stop within the assured clear distance ahead after he had received a warning as to the presence of the track motor car.

Some of the rules which both engineer and fireman were charged with violating, were identical; others, such as the duty to warn, applied only to the fireman.

We are of the view that considerations applicable to voluntary arbitration do not apply here. Title 45 U. S. C. § 157 provides that disputes may be submitted to arbitration, but this procedure was not utilized. If it had been used, then the arbitrator could have fashioned a remedy and made an award which would have been binding on both parties. The trilogy of the *Steel Workers* cases, relied on by Russ, supports this proposition.

Russ was not required to utilize the provisions of the Act, but could have instituted an action for damages for wrongful discharge, against the railroad, in a court of competent jurisdiction. *Moore v. Illinois Central R. Co.*, 312 U. S. 630; *Slocum v. Delaware L. & W. R. Co.*, 339

U. S. 239, 244, 245; *Transcontinental & Western Air v. Koppal*, 345 U. S. 653.

In a suit for damages, the only remedy the Court could fashion would be to apply the law of Master and Servant. If the discharge was not wrongful, plaintiff could not have recovered damages.

It should be pointed out that the proceedings before the Board amounted to compulsory arbitration. The Board was not a governmental agency. Its members were named by the railroads and the unions. The appeal afforded the railroad in money awards, where liability could be tested according to legal considerations, was probably necessary to give constitutional validity to the Act.

Here the Board and the Court found that the engineer had violated the company rule. Neither found that the discharge was wrongful. Neither found that the railroad in discharging the engineer acted arbitrarily. We think that the award based on discrimination, without taking into account differences in duties and in the degree of responsibility and fault, was arbitrary. The monetary portion of the remedy fashioned by the Board was not final and conclusive but was subject to judicial review in a de novo trial. The money judgment entered by the District Court against the railroad was erroneous.

The judgment of the District Court is reversed and the cause remanded, with instructions to set aside the award of the Board.